

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Creation of a Low
Power Radio Service

MM Docket No. 99-25

To: The Commission

REPLY COMMENTS

EDGEWATER BROADCASTING, INC. (“EB”) and RADIO ASSIST MINISTRY, INC. (“RAM;” and together with EB, the “*Ministries*”), hereby submit their reply comments regarding certain issues related to low power FM (“*LPFM*”) raised by commenting parties respecting the *Third Report and Order and Second Further Notice of Proposed Rulemaking*, Creation of a Low Power Radio Service (“*Third R&O*”), 22 FCC Rcd 21912 (2007).

The Ministries vigorously support the position advocated by National Religious Broadcasters (“*NRB*”) that, if limits are to be imposed upon the number of FM translator station applications that a single party may file and prosecute, the numeric limit be fifty (50) rather than ten (10). To that end, the Ministries adopt by reference the arguments advanced by NRB in that regard, and strongly urge the adoption of NRB’s position as being reasonable and fair.

Additionally, the Ministries urge the Commission to promptly grant any pending singleton FM translator applications and exclude those singleton facilities from any numeric limit that hereafter may be imposed. As a practical matter, the pending singleton

applications are no impediment to other pending applications and have little or no material adverse effect upon LPFM allotments.^{1/} By and large, the pending singleton FM translator applications propose service to remote and rural areas that garner little or no interest from LPFM proponents. That proposition is supported by the fact that the singleton applications are not mutually exclusive with any other proposal and essentially are ready and available for grant by the Commission, subject only to the agency's administrative action. No commenting party has apparently opposed the grant of these singleton applications, and granting them will advance the mandate of § 307(b) of the Communications Act of 1934, as amended,^{2/} by making "... such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services"^{3/}

Many LPFM proponents support extensive protections for LPFM facilities based upon a fabricated presumption – that really is not evidenced – that LPFM operators somehow provide local service that is of a better, more virtuous quality, than either com-

^{1/} Early in this Docket 99-25, the Ministries submitted technical demonstrations illustrating the token impact that existing FM full power radio stations, existing FM translator stations, and pending FM translator applications have upon existing LPFM stations and spectrum resources for additional LPFM stations (*i.e.*, LP100 stations). Although the study demonstrates that that LPFM proponents have ample opportunity throughout the United States to locate LP100 stations the Commission essentially has discounted the Ministries' data and has embraced a notion that LPFM's development is stymied by a paucity of usable spectrum. That notion appears to be antithetical to fact. *See* the Ministries' "Further Comments" submitted in this Docket on April 5, 2008.

^{2/} 47 U.S.C. § 307(b).

^{3/} *Id.*

mercial or even religious full-power FM (“*FPPM*”) licensees.^{4/} There is no evidence that LPFM stations better serve a community – be it a micro community, or a neighborhood – than FPPM stations. Basically, the LPFM proponents castigate FPPM licensees for desiring to improve their facilities and service. These improvements are denigrated as being solely for economic purposes.

But in the final analysis, is that not what the LPFM proponents are advocating by arguing for greater protections to LPFM at the expense of FPPM? The fact is that LPFM licensees constructed stations knowing that they were designated as secondary facilities. They assumed the risk inherent in a license with secondary status. Now LPFM proponents strongly urge the elevation of LPFM from secondary status, as well as obligatory compensation from FPPM for displacement. These changes *only* can be to protect and enhance the LPFM assets. Thusly, one must earnestly ponder why an LPFM asset (which the licensee knew full well was an at-risk facility because of its secondary status) somehow is of greater importance in the administrative licensing scheme than FPPM or FM translators. In fact, they are not.

Little or no evidence is provided by the LPFM supporters, aside from generalizations and apocryphal conclusions, that LPFM actually provides service that is any way superior to the localism achieved by FPPM licensees. In fact, the report submitted by Phi-

^{4/} Both EB and RAM are licensees, in their own respective names, of FPPM stations.

lip Daniel Goetz^{5/} suggests that compiling meaningful information from operating LPFM stations is sketchy, at best, lacks any meaningful corroboration or consistency in data accumulation, and is not correlated for fundamental comparison purposes with FPFM operations in any common market.

Should the Commission choose to attempt to measure LPFM against FPFM on a “localism” programming basis, it will be very hard pressed to defend such a position. For example, with music programming, why is the musical note “C” that is played on a guitar by a local music group more significant or “local” than a “C” played on a guitar from musical group from Liverpool, England? Why is a Sunday-morning Christian service that is sustaining and un-sponsored any more important or significant than the same Sunday-morning Christian service if sponsored? Is a broadcast political program that addresses a community issue of public importance any more important or significant than a broadcast religious sermon that is aimed at the same community issue of public importance? These are difficult questions and of the type that likely will have to be resolved if the Commission attempts to defined “localism” by means of program content. It is an impossible mission, yet that is the underlying platform that now appears to driving (a) the Commission’s rational regarding LPFM and (b) LPFM proponents seeking greater technical protections for LPFM.

^{5/} Low Power FM Broadcasting: A Survey Snapshot of the Field by Philip Daniel Goetz, B.A., Presented to the Faculty of the Graduate School of The University of Texas at Austin in Partial Fulfillment of the Requirements for the Degree of Master of Arts The University of Texas at Austin, December 2006, hereafter referred to as the “*Goetz Report*.”

Any definitive regulatory comparison between LPFM and FPFM must be based upon a meaningful definition of the “public interest” that is delineable with “ascertainable certainty.”^{6/} Any comparative assessment of “localism” that is based upon programming content will have to be exceedingly refined and bright-line, lest it offend the First Amendment to the Constitution. It is respectfully submitted that the Commission will be hard-pressed to formulate a reasonably defensible definition or listing of constituent elements for “localism” that will legally permit a comparison of LPFM programming against FPFM programming, so as to determine which is more in the “public interest.”

In addition to the “public interest,” when weighing protections for LPFM the Commission also must assess which service – LPFM or FPFM – is most likely to provide the greatest public safety benefits. That is a subject that seems to be dismissed by many LPFM proponents.

Many LPFM stations operate on a limited schedule, not only on a daily basis, but on a calendar basis. If the Commission balkanizes the FM spectrum by reducing interference protections for FPFM, or by limiting FPFM relocation and channel changes in favor of LPFM protections, it will fragment the ability of broadcasters to effectively and efficiently disseminate public safety information in times of disaster or public calamity. Which service – LPFM or FPFM – is more likely to be operating on a 24/7 basis? Which service – LPFM or FPFM – is likely to be more efficient in widely disseminating public safety information to as many people as possible in as short a time as possible? Which

^{6/} *ICO Global Communications Ltd. v. FCC* 428 F. 3d 264, 269 (D.C. Cir. 2005).

service – LPFM or FPFM – is likely to have auxiliary power sources, or auxiliary transmitters, that permit continued operations when public utilities fail or primary transmission facilities are destroyed?

Given the plethora of comments in this proceeding that consistently profess the economic privations that are suffered by LPFM licensees, one may reasonably conclude that only FPFM stations will provide superior public safety services, as compare to LPFM. As grim as it may be, if the FCC endeavors to provide additional protections for LPFM, to detriment of FPFM, then it also should ask itself whether it will accept responsibility for any person – adult or child – who may be injured or slain in a natural disaster, because they were unable to efficiently receive public safety information, due to the so-called “Swiss-cheese” affect.^{7/} Only if the Commission can unequivocally state that the balkanization of the FM band, in the name of LPFM, will not adversely affect the public safety, should it give consideration to affording LPFM primary status and protections that are detrimental to FPFM and FM translators.

Before adopting any of the proposals contemplated by the Commission in the Third R&O, the proposals should be weighed against the operative language of Section 307(b). It is respectfully submitted that the protections proposed in the Third R&O for LPFM are antithetical to “a fair, efficient, and equitable distribution of radio services” The statutory language of § 307(b) is connective. Thus, any spectrum use must be

^{7/} See, Comments of the National Association of Broadcasters (NAB), dated April 7, 2008, pages 3, and 10-12. For the record, the Ministries support the NAB’s arguments and position regarding second and third adjacent channel protections.

fair and efficient and equitable. Regardless of the altruistic premise for LPFM, the balkanization of the FM spectrum can hardly be deemed to an efficient spectrum use. Moreover, practically all of the LPFM proponents omit or ignore any § 307(b) assessment of the LPFM rule changes proposed in the Third R&O. A § 307(b) assessment, however, is a *sine qua non*, and must be considered. Therefore, it is respectfully submitted that when measured against § 307(b), the proposed LPFM rule changes fail the required statutory test, and accordingly must be abandoned by the Commission.

In summary, for the reasons set forth in the comments of many FPFM and FM translator proponents, the Commission would be well served to reconsider and reverse its decisions in the *Third R&O* to limit to ten (10) proposals per applicant the processing of FM translator applications submitted during the Auction No. 83 filing window. Rather, if a limit is essential and necessary, a cap of fifty (50) is more reasonable than ten. Further, on reconsideration it should decline to impose forced dismissals of FM translator applications, allow the auction process to work to limit applications as it had initially judged adequate; or, alternatively, adopt other more restrained means to accomplish its objectives – but only after making a clear and reasoned determinations that such steps will, in fact, advance a fair, efficient, and equitable distribution of radio service. In lieu of that, it should grant the pending singleton applications that presently are unopposed, irrespective of any limit.

WHEREFORE, the premises considered, the Ministries request that: (a) the FCC process for grant all extant singleton FM translator applications now on file, (b) permit applicants to retain all applications that aim to serve rural areas, among others, and (c) if numeric restrictions must be imposed on the acceptance of FM translator applications, the limit be set at fifty (50) per applicant, and no fewer. Lastly, the Ministries again request that the Commission reject all specious and insinuating allegations that merely because the Ministries filed a copious number of applications, notwithstanding the absence of any limitations whatsoever, the Ministries somehow abused the Commission's processes.

Respectfully submitted

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&

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